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No. 91-7849

In The

Supreme Court of the United States

October Term, 1992

STEPHEN BUCKLEY,

Petitioner,

vs.

MICHAEL FITZSIMMONS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITONER

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INTRODUCTION

The briefs of respondents and Amici misrepresent the facts in this case and the holding of *Imbler v. Pachtman*, 424 U.S. 409 (1976), and swear allegiance to the functions test espoused by *Imbler* whilst abandoning it in fact. In addition, the briefs all but ignore the impact of the expansion of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the enlarged protection against vexatious litigation *Harlow* gives to public officials such as prosecutors, and the corresponding diminution of the importance of affording respondents absolute immunity. At different points, each of these briefs acknowledges that each type of conduct alleged against respondents is not entitled to absolute immunity,[1] and agree on little other than that petitioner should lose. When the facts alleged by petitioner are accepted, as they must be at this stage of the litigation, and the functions test of *Imbler* is applied in a principled manner, it is apparent that respondents are not entitled to absolute immunity for their acts which caused the false arrest and imprisonment of petitioner and denied him a fair trial. Moreover, respondents' concession that immunity for prosecutors was not well established in 1871,[2] if indeed it was established at all, argues forcefully in favor of recognizing a cause of action against

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[1] *See*, Brief of Respondents at 17, "interrogation of witnesses and suspects during a criminal investigation is not fairly characterized as necessary to the judicial phase of the criminal justice process;" Brief of Respondents at 19-20 (suggesting fabrication of evidence not entitled to absolute immunity); Brief of Amicus United States at 12, "Prosecutors are not entitled to absolute immunity for public statements concerning pending litigation."

[2] Brief of Respondents at 44.

prosecutors for a malicious decision to prosecute based on an improper ulterior motive.

FACTS

Petitioner's claim is that respondents directed and participated in a year long pre-arrest and pre-indictment investigation during which they fabricated the case against him, then caused him to be wrongfully imprisoned, defamed him, and destroyed his rights to affordable bond and a fair trial by helping to orchestrate a barrage of prejudicial publicity. Respondents and their Amicus continually attempt to recast this fabrication as preparation for trial, "manipulation" and "evaluation of the evidence," (Brief of Respondents at 19), and as "selecting experts" (Brief of Amicus at 9), but the allegations in the complaint are otherwise. The complaint alleges that respondents paid money to two persons, Hernandez and Cruz, in return for statements that falsely inculpated petitioner (J.A. 11, ¶ 39, 40), and "constructed" and "manufactured" evidence from forensic personnel by persuading them to falsely assert that petitioner's boots made a bootprint on the Nicarico's door. J.A. 7-9, ¶ 23, 25-29, 31; J.A. 14 ¶ 53-55. Sometime after the statemer s and bootprint evidence were concocted, they were presented to the grand jury which indicted petitioner. This was the only "evidence" which incriminated petitioner.[3]

[3] Respondents' assertion that Hernandez voluntarily came forward with statements implicating petitioner in the murder (Brief of Respondents at 20), is completely untrue. Hernandez said only that Buckley was present at a post-murder conversation when the murder was discussed. J.A. 7, ¶ 22.

By no stretch of the imagination could such actions be validly termed evaluation of evidence. The bootprint and boots had no importance absent additional evidence which linked the two. They were like a pile of white powder in a drug case, which proves nothing without testimony as to what the white powder is; or a finger print and a finger which must be linked by forensic testimony to have any probative force whatsoever. By persuading the forensic personnel to falsely state that petitioner's boot made the bootprint, respondents created evidence where none existed before and prepared the groundwork for a prosecutor – be it respondents or others – to later use this evidence to arrest, imprison and prosecute petitioner. Respondents' coercion of false statements from the forensic personnel was not done for the purpose of evaluating the strength of evidence they already had or determining how to present it. It created evidence which could be used in the event charges were brought against petitioner.

It is also incorrect for respondents to assert that the only wrongful acts with which they are charged occurred at the grand jury and the criminal trial.[4] The concoction of false testimony and participation in the prejudicial publicity campaign were no less wrong because they did not immediately cause constitutional injury, just as negligently maintaining an airplane is wrong even though the plane does not crash until some time later, or placing an unreasonably dangerous item into commerce is wrong

[4] *See, e.g.*, Brief of Respondents at 15 (asserting that this case raises the question whether immunity is available to a prosecutor "who participates in the investigative process, but does not engage in any activity which violates the Constitution other than through the grand jury and criminal trial process"); Brief of Respondents at 18 (arguing immunity applicable because the "interrogation (was) not conducted illegally.").

even though injury does not occur until months or years later.

I. RESPONDENTS' INVESTIGATIVE ACTS CAUSED PETITIONER'S FALSE ARREST, IMPRISONMENT AND PROSECUTION AND ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

Respondents' arguments, and the opinions of the Court of Appeals, rest on the erroneous assumptions that petitioner's injury had only one proximate cause – the immunized indictment and prosecution – and that this broke the chain of causation linking petitioner's injuries to respondents' earlier wrongful acts. Both of these assumptions are false, and lead to the logically and doctrinally flawed positions taken by respondents and the Court of Appeals, whereby the place of injury determines what function the prosecutor was performing when he previously did some act, and thus controls immunity.[5]

Judicial proceedings, including indictment and prosecution, do not necessarily absolve from liability a witness or investigator who maliciously participates in those proceedings. *Burns v. Reed*, 111 S.Ct. 1934 (1991); *Malley v. Briggs*, 475 U.S. 335, 340-41 (1985); *Jones v. City of Chicago*, 856 F.2d 985, 993 (CA7 1988); *White v. Frank*, 855 F.2d 956 (CA2 1988); *Dellums v. Powell*, 566 F.2d 167 (D.C. 1977); E. Scalia, *Police Witness Immunity Under § 1983*, 56 U. Chi. L. Rev. 1433, 1441-2, 1452-56. These authorities recognize both that injury that occurs within a judicial proceeding may be compensable in a civil suit, and also that such injury is caused by more than those judicial proceedings.

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[5] Amicus United States rejects this "place of injury" test, *sub silentio*, when it contends that prosecutors are not immune for public statements which cause injury in judicial proceedings. Brief of Amicus United States at 21.

Obviously, the judicial proceedings were *one* cause of the injuries suffered by plaintiffs in *Burns*, *Malley*, *Jones*, *White*, and *Dellums*, but another proximate cause, independent of, but acting together with, the judicial proceedings, was some out-of-court act which set into motion, preceded, or succeeded, those proceedings. In *Burns* it was erroneous legal advice that caused a false arrest, a judicially authorized search, and a judicial determination of probable cause which caused four months of incarceration; in *Malley*, it was an arrest without probable cause based on a judicially issued warrant; in *Jones*, it was officers and forensic personnel who concealed evidence and misrepresented facts, causing plaintiff to be falsely arrested, indicted, and prosecuted; in *White*, it was police officers who acted as complaining witnesses; and here, it is prosecutorial investigators who coerced false statements from forensic personnel and purchased false statements from witnesses.

In each case the major part of the injuries caused by the non-immunized act would not have occurred without additional, immunized, actions by prosecutors, judges, or grand juries, but the non-immunized activities were a concurrent cause of the injuries, and the persons responsible for those activities were liable. It is thus clear that no immunity attaches merely because one cause of petitioner's injuries was immunized activities in the judicial process. Because such a thesis is integral to the arguments of respondents and the holding of the Court of Appeals, it is apparent that they are both wrong.

This Court has consistently stressed that an official's immunity depends upon the function he is performing when he commits the challenged act, not his title or position. Since injury sustained in the judicial process may be caused by both prosecutorial and non-prosecutorial acts, this functional approach leads inexorably

to the conclusion that when a prosecutor performs non-immune investigative acts he is liable, even if the injury occurs in the judicial process and is also caused by prosecution or indictment. An investigative act can cause compensable injury in the judicial process; a prosecutor is not immune for an investigative act; therefore, a prosecutor may be liable for injuries sustained in the judicial process which were caused by an investigative act.

It should not affect this syllogism that the person who performed non-immunized acts is the same person who subsequently performs immunized prosecutorial acts. In that case, he is being sued for his non-immune acts, and it would be the height of illogic to suggest that the functional nature of such acts is transformed by the subsequent performance of immunized acts. If this concept were accepted it would poke a large hole in the fabric of this Court's consistent stress on functional analysis. Subsequent acts by the same actor cannot alter the nature of the function the actor previously performed.

The "place of injury" test espoused by respondents and the Court of Appeals thus falls of its own weight, since it cannot comprehend a prosecutor performing different functions at different times, and sweeps too wide to blanket all of a prosecutor's acts with immunity if he or someone else performs a single immunized act which is one cause of an injury. Once this test is discarded and the functions test of *Imbler* re-enthroned, it is evident that respondents did perform investigative acts which were a proximate cause of injury to petitioner and which are not entitled to immunity.

Both respondents and the United States go to great lengths to make this case identical to *Imbler*, and in so doing misrepresent both the facts here and the facts and

holding of *Imbler*. This Court's decision in *Imbler*[6] rested upon allegations that prosecutor Pachtman had conspired with others to unlawfully *charge* and *convict* Imbler, had intentionally or negligently *allowed* a witness to give false testimony, that an *expert* had suppressed evidence, and that Pachtman *used* a police artist's sketch that a police officer had altered to resemble Imbler. *Imbler* at 415-416. Contrary to the claims of respondents and their amicus,[7] the decision did not rest upon any finding that Pachtman conspired to alter the sketch, personally suppressed a finger print expert's exculpatory opinion, or otherwise personally participated in the investigation or in creating false testimony or exhibits.

Moreover, the United States' claim that "*Imbler* holds that a prosecutor is absolutely immune with respect to investigatory activities that cause harm solely because they culminate in a criminal prosecution" (Brief of United States at 19[8]), is directly contradicted by the express

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[6] To the extent the complaint in *Imbler* made factual allegations more expansive than the facts upon which this Court decided the case, it is this Court's opinion which controls. There could be any number of reasons why the facts in the complaint were different from the facts before this Court, based on prior proceedings in the case or the scope of this Court's grant of certiorari. Thus, the complaint in *Imbler* is largely irrelevant at this time.

[7] Brief of Respondents at 20-21; Brief of United States at 17.

[8] This claim parallels the United States' argument in *Burns v. Reed*, which was firmly rejected by the Court, that investigative acts "related to the ultimate decision to prosecute" should be immune. *Burns* at 1944. The argument of Amicus Appellate Committee of the California District Attorneys Association that conduct "related to an adjudicatory proceeding" should be immunized (Brief at 7), has already been rejected by this Court in *Burns*, 111 S.Ct. at 1944, and by implication in *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985), where this Court "found that

words of *Imbler* that "We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Imbler* at 430-31; *see also, Burns v. Reed*, 111 S.Ct. 1934, 1939 (1992). On the other hand, *Imbler* stressed that only activities that were "an integral part of the judicial process" were entitled to immunity, *id.* at 430, and cited with approval several court of appeals decisions upholding liability against prosecutors for their investigative acts which caused injury in the judicial process. *Id.* at 430 n.31.[9] The argument of the United States that *Imbler* has already answered the question of immunity for investigative acts, which this Court granted certiorari to determine, is thus absurd.

While *Imbler* did not attempt to firmly delineate between immunized and non-immunized investigative acts, its language strongly supports denial of immunity for the type of conduct alleged here. *Imbler* noted that the conduct at issue there was an "integral part of the judicial

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the Attorney General 'was not acting in a prosecutorial capacity' and thus was not entitled to the immunity recognized in *Imbler*," "even though the wiretap was arguably related to the criminal prosecution." *Burns* at 1944.

[9] Citing to *Guerro v. Mulhearn*, 498 F.2d 1249, 1256 (CA1 1974) (no immunity for prosecutors who caused false convictions by unconstitutional wiretapping); *Hampton v. City of Chicago*, 484 F.2d 602, 608-609 (CA7 1973), *cert denied*, 415 U.S. 917 (1974) (no immunity for raid to gather evidence of alleged criminal activity which led to false arrest and malicious prosecution); *Robichaud v. Ronan*, 351 F.2d 533, 537 (CA9 1965) (no immunity for prosecutor's attempts to coerce confession during investigation); *Lewis v. Brautigan*, 227 F.2d 124 (CA5 1955) (no immunity for prosecutor for coercing plea by removing plaintiff from jail to a distant prison and intimidating him).

process" and "intimately connected with the judicial phase of the criminal process," *id.* at 430, and suggested that immunity should be imposed where the prosecutor was acting "as an officer of the court." *Id.* at 431 n.33. Though recognizing that the duties of a prosecutor in his role as an advocate could cover "actions preliminary to the initiation of a prosecution and actions apart from the courtroom," *id.* at 431 n.33, the examples of such activities listed by the Court did not include the type of pure investigation alleged against these respondents.[10] The language of the court in *Imbler* is a far cry from its interpretation by respondents and the United States. Under their arguments *any* investigative act by a prosecutor which causes injury in the judicial process is immunized, no matter how distant the act was from the judicial process or how removed the prosecutor was from acting as an officer of the court.[11] The careful distinction made

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[10] Even with respect to many of the prosecutorial functions listed in *Imbler*, the Court declined to determine which were entitled to absolute immunity. *Id.* at 433 n.33.

[11] Respondents' recognition that a prosecutor is *not* immune for using excessive force to obtain evidence (Brief of Respondents at 18), illuminates the contradictions in their argument. The prosecutor is obtaining evidence and causing injury in the judicial process and thus, if respondents are to be faithful to their argument, he *should* be immune. Perhaps aware that licensing the third degree by prosecutors would shock even the hardest heart, respondents shrink from this argument. Nor is it logical to argue that a victim could recover for the physical injuries caused by the beating, but not for the injury caused by use of the coerced confession at trial. Since immunity focusses on the acts performed, it is the act that is either immunized or not, not the injury that results from that act. Thus, if injury in the judicial process immunizes the act the immunity covers all consequences of that act, including the physical injuries caused by the beating.

by *Imbler*, and developed further in *Burns*, between prosecutorial and investigative acts is thus eviscerated.

Imbler recognized that identifying prosecutorial acts entitled to immunity could be "difficult" and eschewed reliance on the facile "place of injury" test. *Id.* at 431 n.33. *Burns* considered the issue further, and held that a prosecutor's acts in advising police, both on how to collect evidence – whether they could interview a witness under hypnosis – and whether they had sufficient probable cause to arrest, were not entitled to immunity, since "advising police in the investigative phase of a criminal case" is not a function "intimately associated with the criminal process." *Burns* at 1942. *Burns* strongly supports the denial of immunity here. Under *Burns*, respondents would not be entitled to immunity for advising the police investigators to purchase false statements and fabricate evidence; they can hardly be entitled to immunity for actively participating in the wrongdoing instead. Respondents' attempt[12] to distinguish *Burns* on the basis of their description of the nature of petitioner's cause of action – false arrest compared to deprivation of a fair trial – is unavailing. Petitioner's complaint includes claims for false arrest and imprisonment, as well as deprivation of fair trial, based upon non-immunized investigative and administrative acts of respondents. Contrary to respondents' contention, false arrest is not restricted to occurrences unmediated by judicial process. *Malley v. Briggs*, 475 U.S. 335.

The Court of Appeals opinion approving immunity for "the entire investigation of a case," J.A. at 92, is inconsistent with *Imbler* and *Burns* and this Court's functional approach to immunity. When viewed in their proper light, the challenged acts of respondents were

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[12] Brief of Respondents at 22.

investigative acts which were not intimately connected to the judicial process. Absolute immunity for these acts is not warranted by history, policy or precedent.

II. RESPONDENTS ARE NOT ENTITLED TO IMMUNITY FOR THEIR DECISION TO PROSECUTE PETITIONER

Respondents have acknowledged that at the time § 1983 was enacted the immunity of prosecutors for malicious prosecution was not well established. Brief of Respondents at 44. Under settled principles of statutory construction this dictates that the clear language of § 1983 should not be read as subject to such an immunity, since "we do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy," *Tower v. Glover*, 467 U.S. 914, 922-23 (1984), and "we would be going far to read into (§ 1983) an absolute immunity for conduct which was only accorded qualified immunity in 1871." *Malley v. Briggs*, 475 U.S. at 335, 342 (1985). In light of the expanded protections of qualified immunity now available to prosecutors, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court should restrict *Imbler* to the core conduct alleged against the prosecutor there – the presentation of material in judicial proceedings – and afford prosecutors absolute defamation immunity but only qualified immunity for malicious decisions to indict.

III. RESPONDENTS' PRESS CONFERENCE AND PUBLICITY CAMPAIGN ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

Respondents' argument that they should be absolutely immune for their press conference and publicity campaign is so bereft of support that it has been abandoned by the United States on behalf of its prosecutors. Specifically, the United States concedes, on the basis of this Court's decision in *Burns*, that "a prosecutor's

actions in providing public information, like his actions in providing legal advice to police, would normally appear to warrant only qualified immunity" because "they are not part of the process of 'initiating a prosecution' and 'presenting the State's case' nor are they otherwise 'intimately associated with the judicial phase of the criminal process.' " Brief of United States at 21.

In arguing to the contrary, respondents make several fundamental misrepresentations and unwarranted leaps of faith, and speculate as to what the common law would be "if the issue were fairly presented." Quoting from *Burns* that "the precise contours of official immunity need not mirror the immunity at common law," respondents proceed to characterize petitioner's claim as one of "fair trial," then equate it with malicious prosecution; claim that "at common law immunity was often tied to specific causes of action, and specific actors," and "press conferences and the impact of mass media on fairness of criminal trials were not contemplated by the common law," and therefore conclude, on the basis that judges were traditionally held immune from malicious prosecution claims, that "Petitioner's claim would have been barred by immunity at common law had the issue been squarely presented." Brief of Respondents at 28-30.

First, the thrust of the entire quote from *Burns*, 111 S.Ct. at 1943, is that the common law is a *limitation* on the conferral of absolute immunity, and that this Court does not have a license to impose the view of the scope of immunity that it deems socially desirable. Second, petitioner's publicity claim is more than simply one of fair trial, but includes false arrest, false imprisonment, and defamation plus deprivation of fair trial – claims for which absolute immunity clearly did not apply at common law. Third, an approach that ties immunity to the actor and cause of action is directly contrary to the functional approach established by this Court in *Imbler* and *Burns*. Fourth, as early as 1807, Chief Justice Marshall, in the treason trial of Colonel Aaron Burr, did contemplate

the effect of massive prejudicial publicity on the fairness of high profile trials, 1 *Burr Trial* 413-416 (1807), and this issue was again considered by this court in 1878 in *United States v. Reynolds*, 98 U.S. 145, 155-6 (1878).[13] Finally, while pre-1871 common law supported immunity for judges for malicious prosecution claims, it did not for prosecutors. *See, supra*, at 11; Brief for Petitioner at 40-47.

Respondents also argue that public policy supports the award of absolute immunity for prosecutorial publicity. Public policy alone cannot justify the imposition of absolute immunity. *Malley v. Briggs*. Additionally, absolute immunity for a wrongful and defamatory press conference or publicity campaign will not create an "enormous" risk of vexatious litigation, nor will it have a chilling effect on legitimate prosecutorial conduct. A claim such as set forth by petitioner here is narrowly circumscribed to those circumstances where it can be fairly alleged that the statements of the prosecutor went well beyond the simple announcement of an indictment and created publicity which both defamed plaintiff and so unfairly prejudiced his trial as to deprive him of due process of law. Such circumstances should be the exception, rather than the rule, and would have no effect on the

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[13] During the voir dire in Aaron Burr's trial, one counsel asserted that "he did not believe there was a single man in the state . . . who had not . . . made up and declared an opinion," while another stated that it was "a libel on Virginia . . . to assert that twelve men could not be found . . . with no other knowledge than what they had picked up from newspapers." The presiding Judge, Chief Justice Marshall, then set forth the voir dire and juror bias principles quoted in *United States v. Reynolds*, 98 U.S. at 155. In *Reynolds*, this Court wrote: "In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity and scarcely anyone can be found among those best fitted for jurors which has not read or heard of it and does not have some opinion in respect to its merits." *United States v. Reynolds*, 98 U.S. at 155-6.

prosecutor who confines himself to announcing an indictment.

Respondents also argue that the expanded protections of qualified immunity are "wholly inadequate" to protect prosecutors from the types of claims petitioner asserts against respondent Fitzsimmons. Brief of Respondents at 34. What respondents are, in essence, arguing, is that because their qualified immunity claim would fail, *Harlow* is rendered inadequate. In fact, *Harlow*, as further strengthened by *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), provides prosecutors with more than ample protection from vexatious litigation. The constitutional deprivations asserted here are clearly established only where the prosecutor strays well beyond the announcement of an indictment and makes a prejudicial and defamatory statement which leads to an unfair trial. *See, Irwin v. Dowd*, 366 U.S. 717, 722 (1961). Hence, any narrow, well considered prosecutorial statement announcing an indictment will be afforded qualified immunity. It will only be the false, defamatory, or otherwise wrongfully prejudicial statements which will necessitate further scrutiny. In such infrequent cases, this scrutiny can often be performed on summary judgment – the plaintiff will have to show evidence of unfair trial which was caused, at least in part, by the prosecutor's statements, a difficult burden that many plaintiffs no doubt cannot attain.[14] Hence, it is clear that qualified immunity provides more than adequate protection to prosecutors for claims of prejudicial publicity.

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[14] Here, unlike most cases, the petitioner is able to show that while venue was not moved for his trial, it was moved in the subsequent trials, lending strong factual support for his claim of jury prejudice due to prejudicial publicity.

IV. THE ARGUMENT OF THE UNITED STATES THAT PETITIONER'S PREJUDICIAL PUBLICITY CLAIM DOES NOT ALLEGE A COGNIZABLE CONSTITUTIONAL VIOLATION IS NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE CONSIDERED; IF IT IS CONSIDERED IT MUST BE REJECTED AS PETITIONER HAS ALLEGED SEVERAL COGNIZABLE CONSTITUTIONAL CLAIMS

After conceding that *Imbler* and *Burns* dictate that absolute immunity does not lie for out-of-court prosecutorial statements such as those made by respondents herein, the United States, and its prosecutors, raise for the very first time whether petitioner has alleged a cognizable Constitutional claim in connection with these acts. Respondents never raised this issue in their Motions to Dismiss, in either of the Court of Appeals proceedings, in either of their responses to petitioner's Petitions for Certiorari, or in their main brief here. Neither the District Court, nor the Court of Appeals, in any of their opinions, addressed this issue, either directly or indirectly,[15] nor can the questions presented to this Honorable Court for review in either of petitioner's Petitions for Certiorari be fairly read to include this question. For a responding amicus to raise at this late date an issue that was never preserved or raised by any of the parties is manifestly unfair, and asks the Court to violate its own Rule 14.1(a) that "only the questions set forth in the petition (for writ

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[15] The government, in a mighty stretch, attempts to elevate passing references by the Court of Appeals to *Paul v. Davis*, 424 U.S. 693 (1971), as recognition of the issue. This attempt is fanciful, to say the least, and finds no support in either opinion.

of certiorari), or fairly included therein will be considered by the court."[16]

In making its request, the government cites *Siegert v. Gilley*, 111 S.Ct. 1789 (1991). In *Siegert*, unlike here, the Court granted certiorari to decide whether the defendant was entitled to *qualified* immunity, *id.* at 1796, and noted that "A necessary concomitant to the determination of whether the right asserted by a plaintiff is clearly established at the time the defendant acted is the determination of whether plaintiff has asserted the violation of a Constitutional right at all." *Id.* at 1793. Here, the issue is absolute immunity, a question wholly separate from the question of whether plaintiff has alleged a colorable constitutional violation. While resolution of qualified immunity is made by resort to the same decisional law as that which resolves whether there is an underlying constitutional claim, absolute immunity is resolved by a different body of law. Hence, in this case, unlike in *Gilley*, no discussion or analysis of the underlying constitutional claims can be found in any of the decisions or pleadings.[17]

If this Court does consider amicus' new argument, plaintiff offers this necessarily brief response on the merits. Contrary to amicus' assertions, petitioner has set forth several related constitutional claims which arise from the prosecutorial publicity. First, plaintiff has made out a substantive due process claim – a claim which is predicated on "arbitrary and wrongful governmental actions regardless of the fairness of the procedures used

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[16] In addition, certiorari could not have been granted on this question since it was not "pressed or passed upon" by the courts below. *U.S. v. Williams*, 112 S.Ct. 1735, 1739 (1992).

[17] In *Gilley*, the issue of the existence of a clearly established constitutional right was extensively analyzed and decided, presumably after adequate briefing, both by the District Court and the Court of Appeals. *See*, 895 F.2d 797 at 802-803; 692 F.Supp. 1406 at 1411-19.

to implement them." *Zinermon v. Burch*, 494 U.S. 113, 124 (1989), citing *Daniels v. Williams*, 474 U.S. at 331 (1985). Specifically, petitioner has alleged that the arbitrary and wrongful acts of respondents in helping to foment a lynch mob atmosphere were in part responsible for his wrongful imprisonment for three years, facilitated by the mechanisms of a prejudiced bail hearing and trial. *See, Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (CA9 1992). Moreover, again contrary to amicus' assertions, petitioner has alleged that the prejudice occasioned by respondents affected the outcome of the bail determinations and the trial itself;[18] these outcomes, caused by these respondents acting under color of law, are themselves also arbitrary and wrongful governmental actions which also sound in substantive due process.

Additionally, petitioner has alleged related substantive due process claims under the *Paul v. Davis* and *Siegert v. Gilley* defamation plus test. Here, petitioner has more than met the *Paul* requirement as he has alleged defamation which led to a prejudiced bail hearing and trial, which in turn led to wrongful outcomes, and three years of false imprisonment, without probable cause. *See, Buckey v. County of Los Angeles*, 968 F.2d at 795 (CA9 1992).

Additionally, petitioner has also set forth a procedural due process violation in that respondents, by their wrongful publicity, deprived him of a fair and unprejudiced bail hearing, and a fair trial. *See, Brady v. Maryland*, 373 U.S. 83, 86 (1963) (due process violated by prosecutor's misconduct despite appropriate trial procedures afforded to defendant); *see also, U.S. v. Agurs*, 427

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[18] At one point the United States asserts that petitioner cannot challenge the trial outcome because "he was not convicted and the resulting mistrial did not curtail his liberty." Brief of United States at 28. In fact, the opposite is true – an acquittal would have ended the "curtailment of his liberty," but the mistrial enabled respondents to continue their false imprisonment for two more years.

U.S. 97 (1976). A more specific procedural guarantee which underlies this claim is the right to an impartial decision maker, *see, e.g., In re Murchison*, 349 U.S. 133 (1955); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Wolf v. McDonnell*, 418 U.S. 539, 570-1 (1974); *Wang Yang Sun v. McGrath*, 339 U.S. 33 (1950), a guarantee which petitioner alleges was violated by the prejudicial prosecutorial publicity, and which led to his wrongful imprisonment for over three years.

Most significantly, respondents have conceded that petitioner's claim that prosecutorial publicity impaired his right to fair trial constitutes a clearly established due process deprivation. Brief of Respondents at 34. In so doing they rely on *Irvin v. Dowd*, 366 U.S. 717 (1961), a highly charged and publicized serial murder case, where this Court held that a prosecutor's issuance of prejudicial press releases which alleged that the defendant had confessed to the crimes, and the prejudicial publicity which resulted, led to a jury which was not impartial, and hence to a violation of the defendant's due process right to a fair trial.[19]

In an attempt to defeat plaintiff's procedural due process claims, government amicus asks this Court to radically extend this Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), by applying it to this case. The unfairness of raising this particular issue now is demonstrated by its complex nature, and its implication of numerous decisions of this Court. The simple response is, however, that such an extension of *Parratt* and *Hudson* to the prosecutors here is completely unwarranted. Specifically, in

[19] Moreover, in his dissent in this case, Judge Fairchild identified a related due process claim, stating that "Prejudicial pretrial publicity may make it more difficult and more expensive for a defendant to protect the fairness of his trial, and I would recognize that as a constitutional wrong for which damages can be obtained. . . . " J.A. 99.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and *Zinermon v. Burch*, 494 U.S. 113 (1989), this Court refused to extend *Parratt* to situations where the acts of the offending officials were not "random and unauthorized" but rather were pursuant to established procedures, or otherwise officially authorized. Here, it is uncontested that respondent Fitzsimmons was a policymaker under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). J.A. at 20-1, 57-60.[20] Hence, his actions were pursuant to established policy and practices and were the antithesis of random and unauthorized acts. Thus, the presence of established procedural safeguards does not preclude petitioner's procedural due process claim.[21]

[20] Respondents have never contested that they were policymakers, only whether they made policy for the County, rather than the State. *See*, J.A. at 57-60.

[21] Similarly, the cryptic reference to procedures in *Baker v. McCollan*, 443 U.S. 137 (1979), is not applicable here. In contrast to *Baker*, petitioner has alleged here that there was no probable cause to arrest and imprison him, that any colorable basis for holding him was fabricated by these same defendants, and that the procedures offered by the state for redress were infected by prejudice caused by these same defendants. In such a circumstance, this Court's dicta in *Baker* that whether continued wrongful confinement becomes a due process violation is dependent upon the procedures provided by the state, has no force, as the procedures have been rendered meaningless by respondents. *See, Malley v. Briggs; Jones v. City of Chicago.*

CONCLUSION

For all the above stated reasons petitioner urges this Honorable Court to reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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